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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1523

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY MEMORANDUM

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May 28, 1980

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Significantly, neither the Respondent, Federal Energy Regulatory Commission (Commission), nor the intervenor Public Service Commission of New York (New York) dispute the assertion of Petitioner, Transcontinental Gas Pipe Line Corporation (Transco), that the issue presented is of extreme importance in determining the future role of the gas industry in

meeting the energy needs of this country.[1] Rather, the two opponents to the grant of certiorari make various and sometimes conflicting arguments on the merits of the issue in an effort to convince the Court that the case was correctly decided. While we will await the Court's determination on certiorari and briefing on the merits for a detailed response, the following two points should convince the Court that there is indeed involved here an important area of public utility and constitutional law which needs elucidation by this Court.

1. The Commission's contention (Brief in Opposition at 9) that the "prudent investment" theory of ratemaking is not controlling under the Natural Gas Act is obfuscation at its worst. Ever since passage of the Natural Gas Act, the Commission and its predecessor, the Federal Power Commission, have used nothing but the prudent investment method to regulate gas pipeline rates. Indeed, the very case cited by the Commission for its false proposition[2] makes clear that

[1] Indeed, in its brief to the court below, New York disagreed with the Commission's policy decision to disallow all recovery of prudent expenditures by pipelines because "in a period of gas scarcity pipelines should be encouraged to seek out alternate non-conventional gas supplies. . . ." (New York Br. at 5). New York also supported Transco's settlement offer which would have permitted partial cost recovery by Transco but which was rejected by the Commission and affirmed by the court below with no explanation.

[2] *Democratic Central Committee of D.C.* v. *Washington Metropolitan Area Transit Comm'n.*, 485 F.2d 786 (D.C. Cir. 1973). This was not a Natural Gas Act case, but a local transit case. Respondent does not cite any of its own decisions or any court case arising under the Natural Gas Act for its astounding statement.

the prudent investment method is the method used by the Commission and that this is the method which was affirmed by this Court in the landmark *Hope*[3] case. In the case cited by the Commission, the court stated:

> It seems clear that *Hope Natural Gas* thus adopted the [prudent] investment concept which Justice Brandeis has espoused in *Southwestern Bell.*[4]

2. While the Commission stridently reiterates its claim that the "used and useful" principle is a necessary prerequisite to any cost recovery by pipelines, it lamely characterizes its irreconcilably conflicting treatment of unsuccessful projects of electric utilities as "fact-bound" and proceeds to relegate the claimed factual distinctions to a footnote (Brief in Opposition at 10). The claimed distinctions, even if true, are fatuous. The fact that a utility would continue to suffer losses for unsuccessful projects on a recurring basis, which is the claimed distinction in the two Southern California Edison Co. cases,[5] only serves to emphasize that such projects are not "used and useful" any more than are similar unsuccessful projects of gas pipelines. And the fact that all parties agreed that New England Power Co. should recover its losses for unsuccessful projects certainly would not justify abdication by the Commis-

[3] *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944).

[4] *Democratic Central Committee of D.C.* v. *Washington Metropolitan Transit Comm'n.*, *supra* at 802 n. 135 (citations omitted).

[5] There is no such factual distinction, but even if there were, it would not support the blatant discrimination being practiced by the Commission in its different treatment of gas and electric utilities.

sion of its responsibility to apply what it otherwise claims to be a hard and fast "used and useful" principle. Rather, we suggest that the agreement of all parties in the electric cases is proof that the discriminatory treatment by the Commission of similar projects of gas pipelines is an obvious deviation from the appropriate principles of ratemaking under the prudent investment standard. Only this Court can correct such arbitrary actions of the Commission.

Respectfully submitted,

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